

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF MINNESOTA**
121 Seventh Plaza East, Suite 350
St. Paul, MN 55101-2147

In the Matter of Xcel Energy's Petition for
Approval of Electric Vehicle Pilot Programs

PUC Docket No. E-002/M-18-643

**PETITION FOR RECONSIDERATION
AND MOTION**

The Xcel Large Industrials, an ad hoc consortium of large industrial end users of electric energy, for purposes of this petition for reconsideration consisting of Covia Holdings Corporation; Flint Hills Resources Pine Bend, LLC; Gerdau Ameristeel US Inc.; Marathon Petroleum Company LP; and USG Interiors, Inc. (collectively "XLI"); submit this petition for reconsideration ("Petition").

I. INTRODUCTION AND GENERAL BACKGROUND

On October 12, 2018, Northern States Power Company, doing business as Xcel Energy ("Xcel") filed with the Minnesota Public Utilities Commission (the "Commission") a petition for approval of two electric vehicle pilot programs (collectively, the "EV Pilot Programs").¹ The first EV Pilot Program would authorize Xcel to install, own, and maintain approximately 700 EV charging ports for fleet operators (the "Fleet EV Pilot").² The second EV Pilot Program would authorize Xcel to install, own, and maintain EV make-ready infrastructure for approximately 350 charging ports for developers of public charging stations and community mobility hubs (the "Public Charging Pilot").³ Under both pilots, Xcel would own the behind-the-meter EV make-ready infrastructure and under the Fleet EV Pilot, Xcel could also own the charging equipment.⁴ Xcel requested that the Commission (1) approve its recordation of the EV infrastructure as utility distribution plant to allow recovery in rate base, (2) waive the service policy provisions that

¹ Petition for Approval of Electric Vehicle Pilot Programs (Oct. 12, 2018) (eDocket No. 201810-146991-01) ("Application").

² Application at 10.

³ Application at 11.

⁴ Application at 23, 41.

would have required customer contributions in aid of construction (“CIAC”), and (3) approve deferred accounting for the pilot expenses.⁵

Over a dozen parties submitted comments on the proposed EV Pilot Programs, including XLI. The Application was heard by the Commission at its April 11, 2019 meeting and the Commission issued an order on July 17, 2019 (the “Order”).⁶ The Order approved both of the EV Pilot Programs and also approved Xcel’s requests to classify the infrastructure costs as distribution plant, waive the CIAC requirements, and use deferred accounting.⁷

XLI respectfully seeks reconsideration of the Order because it is unlawful, not in the public interest or sufficiently protective of ratepayers, and undermines the Commission’s existing policies. Until the ultimate conclusion of issues pertaining to the Order, XLI moves for an immediate stay of Xcel’s EV Pilot Programs to avoid the disbursement of funds that cannot later be reclaimed.

II. ANALYSIS

A. Petition for Reconsideration Standard

“A petition for rehearing, amendment, vacation, reconsideration, or reargument must set forth specifically the grounds relied upon or the errors claimed.”⁸ The Commission typically reviews petitions to determine whether they (i) raise new issues, (ii) point to new and relevant evidence, (iii) expose errors or ambiguities in the underlying order, or (iv) otherwise persuade the Commission that it should rethink its previous order.⁹ XLI submits this Petition in response to clear violations of Minnesota law, abrogation of the Commission’s prior policies, and ratepayer harms resulting from the Commission’s Order. XLI respectfully asserts that the legal

⁵ Application at 53–54.

⁶ ORDER APPROVING PILOTS WITH MODIFICATIONS, AUTHORIZING DEFERRED ACCOUNTING, AND SETTING REPORTING REQUIREMENTS (July 17, 2019) (eDocket No. 20197-154444-01) (“Order”).

⁷ Order at 9–10, 11, 13, 19–20.

⁸ Minn. R. 7829.3000, subd. 2.

⁹ See, e.g., *In the Matter of the Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota*, MPUC Docket No. E-002/GR-13-868, ORDER DENYING PETITIONS FOR RECONSIDERATION at 1 (July 13, 2015).

errors in the Order, harm to ratepayers that would result, and evisceration of the Commission's policy as it existed before the Order should persuade the Commission to rethink the Order.

B. Utility Ownership of Behind-the-Meter EV Infrastructure Is Unlawful

The Order is contrary to existing law and policy, which does not provide express or implied authority for the Commission to regulate behind-the-meter EV charging infrastructure. The EV Pilot Programs exceed the Commission's authorization from the legislature and are inconsistent with the legislature's policy goals in regulating utility service. The Commission should adhere to state law, the Commission's long-standing policy of ending utility service at the meter consistent with state law, and deny the EV Pilot Programs.

The Order states that the EV Pilot Programs advance the legislative goal of increasing transportation electrification.¹⁰ But there is no express or implied authorization from the legislature to advance transportation electrification through utility ownership of behind-the-meter infrastructure. And utility ownership of such infrastructure is such a drastic departure from the traditional utility model and regulatory compact that the legislature surely would have been clear if it had authorized such a paradigm shift. The Commission is "a creature of statute [and] has only those powers given to it by the legislature."¹¹ As such, "[t]he legislature states what the agency is to do and how it is to do it. While express statutory authority need not be given a cramped reading, any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature."¹² The Commission has neither express nor implied authority to regulate behind-the-meter EV infrastructure.

The Commission's Order relies on Minnesota Statute § 216B.1614 as the source of its authority.¹³ That statute required each public utility selling electricity at retail to "file with the commission a tariff that allows a customer to purchase electricity solely for the purpose of

¹⁰ Order at 9.

¹¹ *Great Northern Ry. v. Public Serv. Comm'n*, 284 Minn. 217, 220–21, 169 N.W.2d 732, 735 (1969).

¹² *Peoples Natural Gas Co. v. Public Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985) (holding that the Commission lacked express or implied authority to enforce its own orders by ordering a customer refund; noting that other enforcement tools were available in the statutes).

¹³ Order at 2.

recharging an electric vehicle.” The statute set forth specific requirements for that tariff’s contents, described approval and revision standards, and imposed data reporting requirements.¹⁴ There are no words in the statute authorizing the Commission to regulate behind-the-meter EV charging infrastructure or authorizing a public utility to own such infrastructure. The statute contemplates a tariff for the purchase of “electricity,” not charging infrastructure. This is clearly not an express authorization for the Commission to regulate behind-the-meter EV infrastructure investments, nor can it be implied. As the Commission points out in its Order,¹⁵ Xcel previously filed and received approval for its Residential Electric Vehicle Charging Tariff to satisfy the statute’s directive and it did not include the ownership of EV supply infrastructure or charging equipment.¹⁶

Nor is there any other statute that gives the Commission express or implied authorization to regulate behind-the-meter EV charging infrastructure. Under Minnesota Statutes section 216B.08, the Commission is given the power to regulate public utilities and under section 216B.09, the Commission is given the authority to ascertain and fix just and reasonable standards to be observed and followed by public utilities “with respect to the *service* to be furnished.”¹⁷ Under section 216B.02, public utilities “operat[e], maintain[], or control[] in this state equipment or facilities for furnishing at retail natural, manufactured, or mixed gas or *electric service* to or for the public or engaged in the production and retail sale thereof.”¹⁸ Under section 216B.16 a utility is entitled to a reasonable return on its investment for “property used and useful in rendering *service* to the public.”¹⁹

Service is defined as “natural, manufactured, or mixed gas and electricity; the installation, removal, or repair of equipment or facilities *for delivering or measuring* such gas and electricity.”²⁰ Authorization for ownership of behind-the-meter EV infrastructure is not expressly stated here and cannot be implied from this definition. Furthermore, the Commission

¹⁴ MINN. STAT. § 216B.1614.

¹⁵ Order at 3 n.4.

¹⁶ *In the Matter of Northern States Power Company d/b/a Xcel Energy’s Petition for Approval of a Residential Electric Vehicle Charging Tariff*, MPUC Docket No. E-002/M-15-111, ORDER APPROVING TARIFFS AND REQUIRING FILINGS (June 22, 2015).

¹⁷ MINN. STAT. § 216B.09 (emphasis added).

¹⁸ MINN. STAT. § 216B.02 (emphasis added).

¹⁹ MINN. STAT. § 216B.16 (emphasis added).

²⁰ MINN. STAT. § 216B.02 (emphasis added).

has previously held that the scope of service ends at the customer's meter, finding that the servicing of gas-powered appliances was "clearly outside the scope of delivery or measurement *at the customer's meter*."²¹ XLI, therefore, submits that Xcel's ownership of behind-the-meter infrastructure as proposed in the EV Pilot Programs cannot properly be categorized as utility service.

Arguments that the meter should not be an arbitrary boundary for utility service fail to recognize the policy objectives served by the meter's role as the clear demarcation of the utility's monopoly power. The Minnesota legislature recognized the natural monopoly inherent in the provision of electric and natural gas utility service and deemed it necessary to regulate public utilities to provide retail consumers "with adequate and reliable services at reasonable rates," to "avoid unnecessary duplication of facilities which increase the cost of service to the consumer," and to minimize disputes between public utilities.²² Utility investment in behind-the-meter infrastructure does not fall within the natural monopoly contemplated by the legislature and does not serve the legislature's stated goals. The facilities at issue here are EV make-ready infrastructure (the electric wiring between the meter and the charging station) and EV charging stations, which are currently supplied by dozens of different companies.²³ The facilities serve only one commercial or fleet customer and there is no risk that they will be unnecessarily duplicated by competing companies. Aside from the delivery of electricity to the customer's meter, every aspect of the EV marketplace that Xcel is attempting to overtake through the EV Pilot Programs could be, and is being, served by the private, competitive market.²⁴ Neither the Commission nor Xcel cited any evidence or argument to refute this fact.

²¹ *In Re Application of the Minnesota Gas Company for Authority to Change its Schedule of Rates for Gas Utility Service in Minnesota*, MPUC Docket No. G-008/GR-80-630, ORDER ON REHEARING at 6–7 (Nov. 25, 1981) (explaining and upholding its Initial Order). While the Commission in that case authorized the utility to continue a leak investigation service, the Commission was explicit that it was giving special recognition to the safety-related portion of the program and not allowing other appliance servicing to continue. *Id.*

²² MINN. STAT. § 216B.01. *See also* MINN. STAT. § 216B.37 (granting utilities monopoly power within their service territories "to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public").

²³ *See e.g.*, GoElectricDrive, *EVSE Products, Charging Networks and Service Providers*, <https://www.goelectricdrive.org/charging-ev/charging-equipment-showroom> (last visited Aug. 3, 2019) (listing over 50 EV supply equipment manufacturers).

²⁴ *See infra*, pg. 8–9.

The meter provides the appropriate demarcation of utility service to protect both ratepayers and the private competitive market. It provides a common-sense delineation of the end of a utility's exclusive domain and the end of the infrastructure for which all customers should bear the cost. Beyond that point, the utility should not be able to leverage its monopoly position to compete in a currently existing private market and it should not force all ratepayers to subsidize private consumer choices. While the EV Pilot Programs at issue here involve public charging stations and some public transportation fleets, *Xcel's ownership* of behind-the-meter infrastructure does not benefit the public. Xcel's ownership of behind-the-meter equipment benefits Xcel and possibly the private business owner, both of whom will now profit from the infrastructure all ratepayers funded.

The Commission should instead follow the precedent it has put forth when dealing with other behind-the-meter investments by utilities. In *Minnegasco*,²⁵ the Commission required the utility to separate its appliance repair program from its regulated utility functions. The Commission explained that:

The primary focus of an examination of what does or does not constitute a utility service must be M.S. §216B.02, subd. 6, which defines service as “natural, manufactured, or mixed gas . . . , the installation, removal, or repair of equipment or facilities for delivering or measuring such gas . . .” The servicing of customer appliances which consume gas is clearly outside the scope of delivery or measurement at the customer's meter. The “adequate, efficient, and reasonable service” requirement of M.S. §216B.04 establishes standards for the utility's system, not for consumers' property.²⁶

In short, the Commission concluded that service—the delivery and measurement of electricity or gas—ends at the customer's meter.²⁷ The utility ultimately operated its appliance repair program as an unregulated affiliate.²⁸ And the Commission has noted this demarcation of the limit of

²⁵ *In Re Application of the Minnesota Gas Company for Authority to Change its Schedule of Rates for Gas Utility Service in Minnesota*, MPUC Docket No. G-008/GR-80-630, ORDER ON REHEARING at 6–7 (Nov. 25, 1981).

²⁶ *Id.* at 7.

²⁷ *Id.*

²⁸ *Minnegasco, a Div. of NorAm Energy Corp. v. Minnesota Pub. Utils. Comm'n*, 549 N.W.2d 904, 906 (Minn. 1996) (addressing whether the affiliate appliance service company had to pay for the goodwill associated with using the utility's name).

utility service in subsequent proceedings.²⁹ Perhaps most troubling is the fact that if Xcel can provide “service” behind-the-meter, then “electric service” extends there as well, which means the service monopoly granted to utilities in Minnesota Statutes § 216B.40 extends behind-the-meter. The consequences of such a decision could be far reaching, impacting other behind-the-meter investments (e.g., rooftop solar). There is simply no argument that the Commission has authority, express or implied, to significantly alter the utility’s monopoly in this fashion.

C. Utility EV Investment Is Not in the Public Interest or within the Commission’s Ken

The scope of utility investment in behind-the-meter EV equipment in the EV Pilot Programs is not in the public interest. The proper avenue to bolster behind-the-meter EV infrastructure is private investment, not ratepayer funds. To be sure, over \$15 million of Xcel’s requested \$23 million for the EV Pilot Programs will be spent on behind-the-meter equipment that Xcel will own and rate base, and on which it will earn a rate of return. The EV Pilot Programs represent a 50% increase in public charging stations in Minnesota. Xcel’s lack of expertise in the EV charging market, combined with uncertainty surrounding the scope and type of investments that will be needed when and if significant EV penetration occurs in Minnesota, makes this an area best left to private investment.

By Xcel’s own estimates, EVs will account for only 1.6% of cars in 2023.³⁰ In 2017, the Minnesota Department of Revenue estimated that there were about 200 new all-electric vehicles registered each year in Minnesota, but the number of all-electric vehicles registered annually had declined over the previous three years and the Department of Revenue assumed no growth for its four-year forecast.³¹ Even if EV adoption rates far exceed the estimates set forth above, there is

²⁹ See e.g., *In Re Complaint by Lake Country Power Against Minnesota Power Alleging Violation of Its Exclusive Serv. Area*, MPUC Docket No. E-15, 106/SA-17-893 (Mar. 5, 2019) (relying on the location of the meter in determining whether Minnesota Power had rendered or extended electric service within Lake Country’s service area); see also *Matter of Implementation of Util. Energy Conservation Imp. Programs*, 368 N.W.2d 308, 313 (Minn. Ct. App. 1985) (holding that energy conservation improvements are not “service” as defined by Minn. Stat. § 216B.02, subd. 6).

³⁰ *In the Matter of a Commission Inquiry into Electric Vehicle Charging and Infrastructure*, MPUC Docket No. E999/CI-17-879, STAFF BRIEFING PAPERS (Dec. 13, 2018) (citing Xcel’s Sept. 10, 2018 IRP Workshop Materials in MPUC Docket No. 15-21 at slide 11).

³¹ Minnesota Dep’t of Revenue, Analysis of H.F. 4, 2nd Engrossment (Omnibus Tax Bill), Article 14, Sections 2-5 (Mar. 29, 2017), https://www.revenue.state.mn.us/research_stats/revenue_analyses/2017_2018/hf0004%20OTB%20electric%20vehicles_1.pdf.

significant uncertainty regarding what infrastructure will be needed, and at what point in time the infrastructure needs to be installed, to support EVs. Xcel is simply not in a position to make educated predictions about what that infrastructure will be. Nor does the Commission have any qualifications or expertise by which to judge Xcel's nescient forecasts regarding the EV market—the legislature directed the Commission to regulate public utilities, not the transportation sector. Most EV charging is done at home or in the workplace³² and the range of EV batteries is continually increasing,³³ making the utility of public charging stations and their ideal locations uncertain. In addition, charging technology is rapidly improving and DCFC chargers could quickly be replaced by wireless charging or other technologies.³⁴ Xcel has no experience with the transportation sector that would enable it to appropriately site and size charging stations, select the most appropriate equipment, advertise stations, or influence customers' parking behaviors to ensure stations are utilized efficiently. Nor has Xcel made any showing of a need to make its proposed investments in the EV Pilot Programs, as would ordinarily be required to protect ratepayer interests.³⁵ In short, there is a high probability that Xcel's proposed \$15 million investment of ratepayers' funds will become obsolete before the infrastructure is in service (*i.e.*, used and useful), and therefore unnecessary and imprudent.

To the protect the ratepayer public, the Commission should ensure that private sector entities, which are already operating and investing in this space with vastly more experience, have the ability to continue investing. Private companies like ChargePoint and Tesla have plans

³² U.S. Dep't of Energy, Office of Energy Efficiency & Renewable Energy, *Charging at Home*, <https://www.energy.gov/eere/electricvehicles/charging-home> (last visited Jan. 30, 2019) (estimating that EV drivers do 80% of their charging at home); Paul Menser, *Charging Behavior Revealed: Large National Studies Analyze EV Infrastructure Needs*, Idaho National Laboratory, <https://www.inl.gov/article/charging-behavior-revealed-large-national-studies-analyze-ev-infrastructure-needs/> (last accessed Dec. 10, 2018) (when EV owners have home and workplace charging available to them, they use those options 97% of the time).

³³ *US BEV Battery Range Increase an Average 17% Per Year and 38 Miles Each Model Update*, EVAdoption, <http://evadoption.com/us-bev-battery-range-increases-an-average-17-per-year-and-38-miles-each-model-update/> (Oct. 1, 2018) ("Since 2011 through projected model upgrades for 2019, automakers will have increased the battery range of their BEV models an average of 38 miles each upgrade – a cumulative 15% increase on average per year.").

³⁴ U.S. Dep't of Energy, Office of Energy Efficiency & Renewable Energy, *Wireless Charging for Electric Vehicles*, <https://www.energy.gov/eere/videos/wireless-charging-electric-vehicles> (last visited Aug. 2, 2019).

³⁵ See, e.g., MINN. STAT. § 216B.243. Although this section generally applies to "large energy facilities," it is counterintuitive that a utility could enter the EV marketplace and expend ratepayer dollars in the face of an undeniable lack of experience and uncertain market. Furthermore, Xcel has already publicly stated its intent to transition the EV Pilot Programs, and similar EV proposals, into long-term (*i.e.*, not pilot) programs. *In the Matter of Utility Transportation Electrification Plans*, MPUC Docket No. E999/CI-17-879, XCEL ENERGY'S TRANSPORTATION ELECTRIFICATION PLAN at 8, 10 (June 28, 2019).

to build out millions of public charging ports³⁶ and businesses in Minnesota are investing in charging infrastructure to draw consumers and as a benefit to workers.³⁷ Xcel's proposed fleet EV partners had plans in the works to convert their fleets and were purchasing EVs before Xcel's petition³⁸ and private companies are focused on EV fleet opportunities as well, including charging stations.³⁹ If Xcel is permitted to move forward with its EV Pilot Programs, its access to risk-free ratepayer funds and ability to offer free infrastructure to customers could quickly disrupt and undermine the private market, squeezing out charging vendors and private companies providing behind-the-meter supply infrastructure and installation.⁴⁰ Combined with Xcel's lack of expertise, this could result in the state and ratepayers being locked into poorly planned and quickly outdated infrastructure with little prospect achieving the objective of expanding the EV marketplace.⁴¹ Instead of allowing Xcel to invest ratepayer funds in a risky market where it has

³⁶ Skip Descant, GovTech, *Strong Growth Expected in EV Charging Stations*, <http://www.govtech.com/fs/infrastructure/Strong-Growth-Expected-in-EV-Charging-Stations.html> (Sept. 17, 2018) ("ChargePoint, which manages a network of EV charging locations worldwide, has pledged to build out 2.5 million public charging ports by 2025, with roughly half of those in North America and half in Europe."); Tesla, *Charge on the Road*, <https://www.tesla.com/supercharger> (last visited Jan. 30, 2019) (showing a map of 1,375 stations with 11,414 superchargers in North America).

³⁷ See, e.g., Dan DeBaun, Minneapolis/St. Paul Business Journal, *Target adding dozens of car-charging stations from Tesla, ChargePoint, VW's Electrify America*, (Apr. 23, 2018), <https://www.bizjournals.com/twincities/news/2018/04/23/target-adding-dozens-of-car-charging-stations-from.html> (both Target and Walmart are adding charging stations at their stores).

³⁸ See Xcel Response to Office of the Attorney General Request No. 2; see also Janet Moore, StarTribune, *Metro Transit plans to shift bus fleet to all-electric* (Dec. 11, 2018), <http://www.startribune.com/metro-transit-plans-to-shift-bus-fleet-to-all-electric/502414551/> (detailing plans to transition bus fleet to all-electric and a contract in July with Flyer of America Inc. to build busses and charging equipment).

³⁹ Chargepoint, *Smarter Fleet Management*, <https://www.chargepoint.com/businesses/commercial-fleet/> (last visited Jan. 30, 2019) (advertising ChargePoint's Fleet EV Services); EV Safe Charge, *Fleets*, <https://evsafecharge.com/ev-fleet-charging-solutions/> (last visited Jan. 30, 2019) (advertising fleet services including infrastructure and installation and maintenance).

⁴⁰ This has already caused concerns in other states where utility investment has been permitted and charging vendors are being blocked from the market. See Martha T. Moore, Huffington Post, *Should Utilities Build Charging Stations for Electric Cars?* (Sept. 11, 2017), https://www.huffingtonpost.com/entry/should-utilities-build-charging-stations-for-electric_us_59b696e7e4b0bef3378ce201. Note also recent comments from the National Association of Convenience Stores in regards to the proposed America's Transportation Infrastructure Act of 2019, expressing concern about utility investment double-dipping by first taking ratepayer financing and then taking taxpayer-funded grants to subsidize the projects, https://www.rigzone.com/news/287b_transportation_bill_would_subsidize_altfuel_stations-30-jul-2019-159438-article/ ("The private sector is investing in electric charging infrastructure and wants to do more of that, but if double-dipping by utilities were allowed, private sector investment would dry up.").

⁴¹ Dave Packard, UtilityDive, *Keys to developing an effective utility EV charging program* (July 5, 2017), <https://www.utilitydive.com/news/keys-to-developing-an-effective-utility-ev-charging-program/446379/> ("Limiting site host control of the charging stations they own also locks utilities into nontraditional end use (beyond the meter) technologies for 10 years or more. This can have a devastating [e]ffect on the EV market, eroding market innovation in products and services and potentially slowing adoption of EV technologies.").

no experience, the Commission should preserve the free market and deny Xcel's request to expand its monopoly role behind the customer's meter.

Finally, the environmental benefits of the EV Pilot Programs are far from certain. EV charging stations will be powered by the mix of generation resources existing on the regional grid. Xcel has not demonstrated that powering EVs with the regional grid's generation mix will lower carbon emissions or any other emissions. Nor has Xcel made any showing that its environmental benefit claims, even if assumed to be true, would be the most cost-effective means of reducing emissions.

D. The Commission Should Reconsider Its Cost Recovery Approvals

As further evidence of the Commission's flimsy and legally deficient basis upon which it approved Xcel's proposed behind-the-meter investments, the Commission unlawfully deviated from traditional accounting and CIAC precedent and rules in approving the EV Pilot Programs. XLI's specific concerns with each aspect of the Order are set forth below.

1. Accounting Classification

The Commission should reconsider its authorization for Xcel to own and rate base behind-the-meter EV infrastructure. The Order approves Xcel's proposed classification of its make-ready infrastructure as utility distribution plant, enabling it to include its capital investments in base rates in its next general rate case.⁴² The Order appears to justify the classification on the basis that Xcel could not determine whether socializing EV costs will encourage EV adoption without "install[ing], maintain[ing], and own[ing]" EV infrastructure.⁴³ But XLI submits that these costs should not be socialized, regardless of whether they encourage EV adoption. Make-ready infrastructure exists behind the customer's meter to serve that customer. The fact that the customer's business provides some other public benefit, like selling EV charging service to other customers or operating EV public transit vehicles, does not justify that customer receiving free behind-the-meter equipment at the expense of all other ratepayers. Nor should Xcel's preference for installing, owning, and maintaining EV infrastructure be a

⁴² Order at 12–13.

⁴³ Order at 13.

justification for approving the proposed accounting treatment—if Xcel wants to enter the EV marketplace, it is free to do so, bearing the risk of its investments through an unregulated affiliate. For the reasons explained in Sections B and C above, the Commission should reconsider this approval.

2. Waiver of CIAC

The Commission should reconsider its waiver of the CIAC provisions and require Xcel to collect a contribution from the businesses that will be profiting from the EV Pilot Programs to protect ratepayers from the full burden of this speculative investment. The CIAC provisions require that customers pay for equipment on the customer’s side of the point of connection (excluding metering equipment) and distribution infrastructure that exceeds 3.5 times the customer’s anticipated annual revenues.⁴⁴ Xcel’s tariff states that Xcel will determine whether expenditures are justified by reference to “the general principle that the rendering of service to the applicant will not cast an undue burden on other customers.”⁴⁵ The Order recognizes that CIAC policies “were developed to protect ratepayers from excessive and unreasonable costs” and that a waiver would be a “departure from ordinary practices,”⁴⁶ yet it approves the CIAC waiver.

The Order’s justification for waiving the CIAC policies appears to be that (1) Xcel does not have sufficient data to predict revenues, (2) facilitating the expansion of EV’s requires a “forward-thinking approach,” and (3) the pilots are limited in duration.⁴⁷ None of these justifications warrant burdening other ratepayers with the costs of the EV Pilot Programs.

First, Xcel’s claim that it cannot create any revenue estimates is not credible and would be reason for concern that it has not studied the experiences of other utilities or sufficiently prepared its system for EV charging. There are few, if any, customers for which Xcel can predict annual revenues with exacting accuracy, yet Xcel’s policy is to calculate a CIAC for customers. Xcel’s inability to calculate precise revenues here does not justify waiving the CIAC

⁴⁴ Xcel Tariff §§ 6, 4.2, 5.1, 5.2.

⁴⁵ *Id.* § 5.2.

⁴⁶ Order at 11–12.

⁴⁷ *Id.*

provisions for EV Pilot Program customers. Furthermore, during the comment period for the Application, Xcel submitted usage and revenue estimates for its EV Subscription Service Pilot Program in Docket No. E002/M-19-186, indicating that it can, in fact, generate estimates of EV charging revenues.⁴⁸ It is therefore unclear why Xcel had an inability to set forth estimates of EV charging and revenues in this docket. Xcel should be required here, as it is required for all other customers, to estimate those annual revenues as best it can and impose a CIAC on EV Pilot Program customers to guard against excessive cross-subsidization.

Second, the Commission is not required to facilitate the expansion of EVs through the “forward-thinking approach” of abandoning the CIAC provisions in Xcel’s tariff. Nor is it authorized to facilitate EV expansion through behind-the-meter investment, as described above. Xcel’s desire to increase its throughput, even coupled with the Commission’s apparent unbridled desire to increase transportation electrification (a sector the Commission does not have authority to regulate), is not reason enough to burden ratepayers with the full costs of infrastructure that has dubious value and benefits only the individual businesses Xcel selects as site hosts and the few EV owners in the state. Traditional cost causation principles should be observed—even more so when considering a speculative investment that benefits only select privileged customers.

Third, while the pilots are limited in duration, they represent significant investments in physical facilities. Waiving the CIAC imposes a substantial undue burden on other ratepayers who may never see any benefits from the EV stations. By providing these EV facilities free of charge to customers, Xcel will effectively block private entities (which will have to charge their customers for such infrastructure) from the market. It also removes an important incentive for host customers to ensure the facilities are efficiently used. Haphazard deployment of ratepayer funds in siting EV charging stations may even further damage the private market.

The Commission should not abandon the CIAC and the important principles of cost causation that it represents in its rush to support transportation electrification. The future of EV technology is uncertain and Xcel’s experience is limited. If the Commission is going to permit

⁴⁸ *In the Matter of Xcel Energy’s Petition for Approval of a Residential EV Subscription Service Pilot Program*, PUC Docket No. E002/M-19-186, PETITION at 10–14 (Feb. 22, 2019).

Xcel to compete with the private market, which XLI adamantly objects to for the reasons set forth above in Sections B and C, it should at least keep the playing field level and require Xcel to collect a CIAC instead of giving Xcel unfettered access to risk-free ratepayer funds. And if Xcel is permitted to invest in EV infrastructure, it should be required to follow the Commission's cost-causation policies so that ratepayers are minimally protected from poor investments through the CIAC.

3. Deferred Accounting

The Commission should reconsider its approval of Xcel's deferred accounting request because it guts the Commission's prior policy on deferred accounting and drastically expands the scope of expenses for which a utility can receive post-hoc approval. As the Order explains, deferred accounting "is a regulatory tool used primarily to hold utilities harmless when they incur out-of-test-year expenses that, because they are unforeseen, unusual, and large enough to have a significant impact on the utility's financial condition, should be eligible for possible rate recovery in the next rate case."⁴⁹ However, these factors are not present here and the Order acknowledges as much in declining to require Xcel to demonstrate that the costs of the EV Pilot Program are unforeseen, unusual, and significant in size.⁵⁰ Instead of addressing parties' arguments on this issue, the Commission relies on its precedent of permitting deferred accounting where utilities have incurred "sizable expenses to meet important public policy mandates."⁵¹

Xcel's expenses for the EV Pilot Programs are neither sizable (when viewed in the scope of Xcel's total revenues) nor made to meet any public policy mandate. First, the Commission emphasizes in its Order, *as a reason to approve deferred accounting*, that the EV Pilot Programs

⁴⁹ Order at 18.

⁵⁰ Order at 20. While the Commission did not engage in an analysis of these factors in the Order, XLI submitted comments explaining that the EV Pilot Program costs were foreseeable and planned investments that could have been included in Xcel's last rate case. Initial Comment of XLI at 16 (Feb. 1, 2019) (eDocket No. 20192-149918-02).

⁵¹ Order at 18; *see also In re Interstate Power & Light Co.*, PUC Docket No. E,G001/M-08-728, ORDER AUTHORIZING DEFERRED ACCOUNTING TREATMENT SUBJECT TO CONDITIONS at 2 (Apr. 23, 2009) (granting request for deferred accounting for operating and maintenance costs associated with floods that shut down several plants and caused flood-related outages to 15,000 customers).

will have “a limited rate impact” and “are limited in scope and duration.”⁵² While XLI does not necessarily agree that there is only a limited rate impact, the EV Pilot Programs are certainly not sizable in comparison to Xcel’s overall annual revenues.⁵³

Second, the EV Pilot Programs are not necessary to meet an important public policy mandate. The Commission asserts that the investments are “*intended* to serve important public policy *objectives*” that the Legislature and Commission have “highlighted” and “encouraged.”⁵⁴ XLI does not agree with this characterization of the Legislature’s or Commission’s actions and believes the Commission has acted outside of its scope of authority in providing any such encouragement. But even if that were not the case, the objectives and encouragement that the Commission references do not rise to the level of a public policy mandate. First, the Commission cannot rely on encouragement from the General EV Order which the Commission concedes “was issued more than one year after Xcel’s initial filing in this case and on the cusp of the Commission’s consideration of this petition.”⁵⁵ The Commission “speaks only through written orders.”⁵⁶ Setting aside the arguments set forth above in Sections B and C as to whether the Commission had the authority to speak on this issue (it did not), the Commission’s alleged encouragement undeniably came well after Xcel’s petition in this case and cannot now be leveraged as justification for approving the EV Pilot Programs. Second, the Commission does not, as it claims, have any “expertise” to provide encouragement regarding EVs because it doesn’t regulate the transportation sector and, as the Commission also notes, the costs associated with EVs are not “typical utility investments.”⁵⁷ Finally, the EV investments proposed by Xcel in the EV Pilot Programs are not necessary to meet any public policy mandate, because there is no legislative mandate to increase EVs and the Commission has not been expressly or impliedly authorized to pursue EV expansion.⁵⁸ In its previous applications of the public policy exception

⁵² Order at 19.

⁵³ The cost of the EV Pilot Programs is one quarter of one percent of Xcel’s total expected revenue over their three-year term. Comments of the Office of the Attorney General at 17–18 (Feb. 1, 2019) (eDocket No. 20192-149954-01).

⁵⁴ Order at 19 (emphasis added).

⁵⁵ Order at 3.

⁵⁶ *In re Excelsior Energy, Inc.*, 782 N.W.2d 282, 296 (Minn. Ct. App. 2010) (citing Minn. Stat. § 216B.33).

⁵⁷ Order at 19.

⁵⁸ See *supra* Section B. The Order notes that Minn. Stat. § 216B.1614 “highlighted this objective [of transportation electrification]” but stops short of pointing to § 216B.1614 as the relevant mandate. That provision provides no mandate relevant to the EV Pilot Programs because it only *requires* the utility to offer a tariff for EV

(continued . . .)

for deferred accounting, the Commission has been clear that it is to be used where there is a statutory or regulatory requirement or mandate, but not for broad public policies that have not been clearly articulated in statutes or as part of a rulemaking procedure.⁵⁹ There is no such mandate here.

Thus, the Commission's Order is creating a new category of expenses that can be approved for deferred accounting: foreseeable, usual, and insignificant expenses that may be helpful to meet an alleged public policy goal that has not been clearly articulated by the legislature. The Commission should reconsider this drastic expansion of its deferred accounting policies, which risks undermining the reliability of rates and the integrity of the traditional ratemaking practice, including rate commitments made in settlement agreements.⁶⁰ As the Commission notes in its Order after blunting its deferred accounting policy, a "more comprehensive strategy for encouraging utilities to innovate *within the regulatory structure*"⁶¹ is needed. To be sure, that strategy is the Commission's traditional ratemaking practice and deferred accounting policy as it existed prior to the Order. A blanket statement for encouraging utility innovation outside the scope of the Commission's authority has absolutely no bearing on the Commission's ability to approve deferred accounting specifically or the EV Pilot Programs generally. The Commission should reconsider this drastic expansion of its deferred accounting policy and deny Xcel's request.

(. . . continued)

charging to residential customers. In other words, the statute only requires a tariff to allow for price parameters of residential EV charging, it does not mandate utility infrastructure development for all customers. MINN. STAT. § 216B.1614 subd. 2.

⁵⁹ Compare *In re Northern States Power Co.*, PUC Docket No. E-002/M-03-1462, ORDER APPROVING DEFERRED ACCOUNTING at 3 (Feb. 25, 2005) (approving deferred accounting for costs the utility incurred "because of the Commission's directive that the Company develop a time-of use pilot project within a short period of time") and *In re Peoples Natural Gas Co.*, PUC Docket No. G-011/M-91-989, ORDER PERMITTING COMPANY TO CONTINUE DEFERRED ACCOUNTING (FEB. 17, 1998) (permitting deferred accounting where costs were incurred to comply with a Commission-required safety program) with *In re Northern States Power Co.*, PUC Docket No. G-002/M-17-894, ORDER DENYING PETITION FOR DEFERRED-ACCOUNTING TREATMENT at 4–5 (Oct. 17, 2018) ("Here, however, the public policy that Xcel invokes is contained in unspecified Minnesota and North Dakota environmental statutes and/or rules. This is not the type of public policy mandate for which the Commission has previously granted deferral, and the Commission does not find good cause based on the Company's legal obligation to clean up pollution at gas plants that have been abandoned for decades.").

⁶⁰ Including the one Xcel made in 2016 setting rates through 2019. *In the Matter of the Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota*, MPUC Docket No. E-002/GR-15-826, STIPULATION OF SETTLEMENT (Aug. 16, 2016).

⁶¹ Order at 20.

E. Motion for Stay

Generally, Commission orders are effective 20 days after filing.⁶² Here, however, the Order specifies that it is effective immediately.⁶³ XLI timely submits this petition pursuant to Minn. Stat. § 216B.27, subd. 1 and pursuant to Minn. Stat. § 216B.27, subd. 3, “[n]o order of the commission shall become effective while an application for a rehearing or a rehearing is pending and until ten days after the application for a rehearing is [resolved].” This Petition therefore tolls the effective date of the Order.

XLI recognizes that the Commission may deny this Petition. Therefore, and pursuant to Minn. R. 7829.0410, XLI respectfully moves the Commission to formally stay the EV Pilot Programs until the ultimate conclusion of the issues outlined in this Petition, including any related appeal, because allowing the EV Pilot Programs to go forward prematurely may result in the expenditure of funds that cannot be recovered. There will be no adequate way to recoup behind-the-meter investments if the EV Pilot Programs go into effect and the Commission (or a judicial body) subsequently reverses the Order. Therefore, XLI respectfully requests that the Commission formally order a stay of the EV Pilot Programs until this matter is final. Pursuant to Minn. R. 7829.0410, subp. 1, XLI advises parties that any opposition to this motion must be filed and served within 14 days of the date of this Petition.

III. CONCLUSION

As outlined above, the Commission’s Order exceeds its express and implied authority, is contrary to the public interest and does not sufficiently protect ratepayers, and undermines the Commission’s own policies. XLI respectfully requests the Commission reconsider and revise the Order to prohibit behind-the-meter utility ownership and deny Xcel’s cost-recovery requests. XLI also seeks an immediate stay of the Order until this matter has reached its ultimate conclusion.

⁶² MINN. STAT. § 216B.26.

⁶³ Order at 25.

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Respectfully submitted,

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